CC1567. Duress, Fraud, Undue Influence, and Mistake.

An apparent consent is not real or free when obtained through:

1. Duress;
2. Menance;
3. Fraud;
4. Undue influence; or
5. Mistake. LegH 1872.

CC1571. Fraud - Kinds

Fraud is either actual or constructive. **Leg.H** 1872

CC1572. Actual Fraud.

Actual fraud, within the meaning of this chapter consists in any of the following acts, committed by a party to the contract, or with his connivance, with the intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is no true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. Any other act fitted to deceive.

CC1574. Question of Fact

Actual fraud is always a question of fact.

CC 1622. Oral Contracts – Validity.

All contracts may be oral, except such as are specially required by statute to be in writing.

CC 1623. Writing Prevented by Fraud or Misrepresentation That Writing Exists.

Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereof, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

CC 1640. Fraud, Mistake, or Accident Obscuring Intent.

When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous part of the writing disregarded.

CC 1649 Understanding of Obligee.

If the terms of a promise are in any repect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

CC 1709. Deceit – Damages.

One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers.

CCP 1856 - Variation of Terms of Document by Prior Agreement or Parol Agreement

(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

(g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an

extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

CC 1916. Impeaching Judgment – Grounds.

Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings

CCP437. c (c) Summary Judgement - Action without Merit or Defence

"(c) The motion for summary judgement shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the paters, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgement shall not be granted by the court based on inferences reasonably dedcuible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

CCP 473.

"The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

CCP 580a. Judgment, How Procured – When Debt is Secured by Real Property.

"Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust

or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth his or her complaint the entire amount of the indebtedness which was secured by the deed of trust or mortgage at the time of sale, the amount for which the real property or interest therein was sole and the fair market value thereof at the date of sale and the date of that sale. Upon the application of either party made at least 10 days before the time of trial the court shall, and upon its own motion the court at any time may, appoint one the probate referees provided for by law to appraise the property or the interest therein sold as of the time of sale. The referee shall file his or her appraisal with the clerk and that appraisal shall be admissible in evidence. The referee shall take and subscribe an oath to be attached to the appraisal that he or she has truly, honestly and impartially appraised the property to the best of his or her knowledge and ability. Any referee so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation of the referee in an amount as determined by the court to be reasonable, but those fees shall not exceed similar fees for similar services in the community where the services are rendered, which may be taxed and allowed in like manner as other costs. Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale; provided, however, that in no event shall the amount of the judgment, exclusive of interest after the date of sale, exceed the difference between the amount of the indebtedness secured by the deed of trust or mortgage. Any such action must be brought within three months of the time

of sale under the deed of trust or mortgage. No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of the deed of trust or mortgage, unless the real property or interest therein has become valueless."

CCP 592. Fact Issues for Jury or Referee or Court – Decision of Law Issue First.

In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

CCP 663 (1) Vacating Judgement - Grounds

A judgement or decree, when based upon a decision by the court, or the special verdict or a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgement entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgement:

1. Incorrect or erroneous legal basis for the decision, not consistant with or not supported by the facts; and in such case when the judgement is set aside, the statement of decision shall be amended and corrected.

CCP 907 Appeal Frivolous or Taken Soley for Delay.

When it appears to the reviewing court that the appeal was frivolous ot taken soley for delay, it may add to the costs on appeal such damages as my be just. **Leg.H.** 1968 ch.385

CCP 908 Action When Judgement Reversed or Modified

When the judge ment or order is reversed or modified, the reviewing court may direct that the prties be returned so far as possible to the positios they occupied before the enforcement of or execution on the judgement or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by ther erroneous judgement or order, so far as such restitution is consistant with rights of third parties and may direct the entry of a money mudgement sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination. **Leg.H.** 1968 ch. 385

Rule 23. Findings and Additional Evidence on Appeal.

(a) [Request for Findings] A request that the reviewing court makes findings of fact shall contain a draft of the proposed findings, and may be made in a brief, or a separate application may be served and filed. If opposing counsel has not had an opportunity in his brief to object to the request, he may serve and file written objection thereto.

(b) [Application to Produce Evidence] Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions, as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a department or a justice thereof, or before a referee appointed for the purpose. The court shall also prescribe reasonable notice of the time and place for the taking of the evidence and shall indicate the issues on which the evidence is to be taken. Where documentary evidence is offered, either party may submit the original or a certified or photostatic copy, thereof and the court may admit the document in evidence and add it to the

record on appeal.

Rule 29. Grounds for Review in Supreme Court.

(A) (Grounds) Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(B) (Limitations) As a matter of policy, on petition for review the Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal; (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for hearing.

170.6. Preemptory Challenge.

(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character or hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

BPC 6068. Duties of attorney

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(5) . . . or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or any such misdemeanor.

(7) Reversal of judgement in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

Pleading § 48.5 - summary judgement

9. Controverted allegations of fraud cannot be resolved upon motion for summary judgement, but only by a trial on the merits.

Rule 83.5 Attorneys - Admission to Practice Standards of Conduct - Duties

f. Discipline.

5. Original Disciplinary Investigations and Proceedings Initiated in This Court.

The "Standing Committee on Discipline" shall investigate any charge or information referred by one of the judges or otherwise coming to the attention of the committee, that any member of the bar of this court or that any attorney permitted to practice in the court has been guilty of unprofessional conduct. At the request of the committee, the chief judge shall direct the issuance of subpoenas and subpoenas duces tecum as may be required by the investigation.

FECP. 59 a Grounds for New Trials

- *Verdict Against the Weight of Evidence,*
- *Verdict is Excessive or Inadequate,*
- *Improper Conduct by Counsel or Court*, when improper conduct by either an attorney or the court unfairly influenced the verdict.[11]

FECP. 60 Reasons for Granting Relief

The Rule provides five specified reasons for which relief may be granted, and adds a sixth catchall category for reasons not specifically listed.

" Where respondent failed to answer petition for writ of mandate, allegations of petition were required to be taken as true for purpose of the action. Rodregues v. Municipal Court of Visalia Judicial Dist. (1972) 102 CalRptr. 45,25 C.A. 3rd 521"

" Affidavits were regarded as pleadings, and as judgement debtor had burden of proof, his allegation which were not controverted by creditor were taken as true, and debtor was not required to prove them. Lentfoehr v. Lentfoehr (1955) P.2d 1019, 134 C.A.2d. Supp. 905."

"Where respondents neither admit nor deny material allegations of petition, they stand admitted. George v. Beaty (1927) 260 P.386, 85C.A.525"

"Judgement may be set aside on motion, where erroneous conclusions of law are inconsistent with findings of fact. Irer v Gawn (1929) 277 P. 1053, 99 C.A. 17."

"Equity will relieve an injured party from the effect of a judgement procured by extrinsic fraud. Gump v Gump (1941) 108 P.2d 21, 42C.A.2d 64; Baker v. Baker (1933) 18 P.2d 61, 217 C.216."

A lower court's finding is "clearly erroneous" when, although there is evidence that supports it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Duke Power Co. v. Carolina Environmental Study Group, Inc. 438 US 59, 98 S Ct 2620 **57 l Ed 2d 595**

The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on review only if "clearly erroneous." Guzman v Ruiz Pichirilo, 369 US 698, 82 S Ct 1095, **8 L Ed 2d 205**

First Amendment questions of constitutional fact compel the United States Supreme Court's do novo review. Bose Corp. v Consumers Union of United States, Inc. 466 US 485, 104 S Ct. 1949, **80 L Ed 2d 502**

The United States Supreme Court has an obligation to test challenged judgements against the First and Fourteenth Amendments and in doing so cannot avoid making an independent constitutional judgement on the facts of the case. Bose Corp. v Consumers Union of United States, Inc. 466 US 485, 104 S Ct 1949, **80 L Ed 2d 503**

Beri v Rogero, 168 Cal 736, 740 [145 P. 951]:
" The law does not favor snap judgements. The policy of the law is to have every litigated case tired upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of mertis alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default. A broad discretion is allowed to courts in granting relief, against default, and its is in cases only where the lower court has abused its discretion that the appellate court will reverse its action."

Fiske v. Buder

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgement obtained by extreme fraud can be secured by noting within a "reasonable time," which might be after the time stated in the rule had run. *Fiske v. Bauder,* C.C.A.8, 1942, 125 F 2d 841; see also inferentially *Bucy v Nevada Construction Co.,* C.C.A.9, 1942, 125 F 2d 213.

States § 18 - conflict with federal law.

2. Under Article 6, clause 2, of the Federal Constitution, providing that federal law shall be the supreme law of the land, the relative importance to the state of its own law is not material when there is a conflict with a valid federal law; any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield.

Free v Bland 369 US 663, 8 L ed 2d 180, 82 S Ct 1089

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff and Respondent, v. DICK WHITE Defendant and Appellant.	D020483 (Super. Ct. No. 655390) **Filed** **January 29, 1997**

APPEAL from a judgment of the Superior Court of San Diego County, Raul Rosado, Judge. Affirmed.

We affirm the judgement in this insurance subrogation action because the defendant, acting in pro per, has not pointed to any facts in the record which entitle him to a new trial.

FACTUAL AND PROCEDURAL SUMMARY

On September 1, 1989, Judie Carey's home was severely damaged when a water main broke near her house. Water and mud from the break damaged her landscaping, furnishings, rugs and carpeting. The main broke when it was hit by an excavator retained by defendant and appellant Dick White, who owned property adjacent to Carey's home.

Carey made a claim on her homeowner's insurance policy, which had been issued by plaintiff and respondent State Farm Fire and Casualty Company (State Farm). State Farm eventually paid Carey $65,000 on the claim and in October 1992 State Farm filed a subrogation action against White.

Trial was initially scheduled to commence on September 24, 1993. On August 10, 1993, White's counsel substituted out of the case and White substituted himself in pro per. According to White, the substitution occurred because he could no longer afford his counsel's services.

On September 13, 1993, White moved for a continuance, for leave to file his cross-complaint, for leave to conduct additional discovery and for permission to designate a new expert. The trial court, the Hon. Barbara Gamer presiding, continued the trial to October 29,-1993, and granted White's request to designate a new expert. However the trial court denied White leave to file his cross-complaint.

On October 29, 1993, White filed a motion for a second continuance and to file a cross-complaint against State Farm. support of his motion, he argued that he had discovered evidence State Farm had not properly investigated Carey's damage claim before paying her $65,000 and that at the time it initiated its subrogation action, State Farm knew Carey could not substantiate all of her claims. The case was trailing on the day White made his motion and the trial court refused to set the motion for a hearing.

Trial commenced on November 8, 1993. At the time the case was called, White asked the judge presiding, Hon. Raul Rosado, to disqualify himself because White believed Judge Rosado had been biased in a completely unrelated proceeding. Judge Rosado denied the motion.

At trial, Carey testified to the damage she suffered as a

result of the water main break, including ruined carpeting, furniture and clothes, structural damage to her house and continuing odors. White subjected her to a lengthy cross-examination as to the damage attributable to the flood and the circumstances under which State Farm eventually paid her $65,000.

The jury returned a verdict in favor of State Farm in the amount of $43,825.76. White filed a timely notice of appeal.

II
DISCUSSION

Although, because White is acting in pro per, we are inclined to interpret the arguments in his briefs liberally in order that substantial justice between the parties is achieved, a great deal of White's brief is devoted to an incoherent attack on the integrity of the trial court judges and members of this court who have presided over aspects of this case and other trial court judges and a retired United States District Court Judge who, from our perusal of the record, did not participate in any manner in the disposition of this case. As we explain below, we reject these arguments summarily because they are not supported by any facts or evidence in the record on this appeal.

With respect to those arguments which reach the merits or the trial court proceeding, we find no error or abuse of discretion which would support reversal of the judgment.

A. Bias of Judiciary

White asserts that his case was intentionally sent to Judges Gamer and Rosado as a result of a conspiracy to retaliate against him for his efforts to uncover scandals involving the notorious collapse of the United States National Bank; the tax-evasion conviction of a prominent San Diego business

man and an unsuccessful attempt to have him committed to a psychiatric hospital. White also alludes to the recent corruption conviction of three former members of the superior court and Judge Gamer's marriage to one of the convicted judges.

With the exception of his unsuccessful motion to disqualify Judge Rosado, none of the bias issues White asserts on appeal was raised in the trial court. Thus, even if we were inclined to credit any of White's conspiracy accusations, we are not able to act on them on White's appeal from the trial court's judgment. (See *Kendall v. Batzer* (1988) 197 Cal.App.3d 619, 625.) With respect to White's motion to disqualify Judge Rosado, we have no power to review Judge Rosado's order denying the motion. White did not file any written objection to Judge Rosado's participation in the case as required by Code of Civil Procedure section 170.3, subdivision (c), and he did not seek timely review of judge Rosado's determination of the issue in this court by way of a petition for a writ of mandamus. (Code Civ. Proc., 170.3, subd. (d).) White's failure to pursue these remedies prevents us from acting on his claim of bias. (*Guedilia* v. *Superior Court* (1989) Cal.App.3d 1156, 1159; People v Klaess (1982) 129 CalApp.3d 820, 824.)

Notwithstanding our inability to act on White's claim of bias with respect to Judge Rosado, we hasten to add the claim is based on nothing more than White's speculation, innuendo and admittedly faulty memory of events which occurred more than 10 years before trial.[1] These accusations, which are entirely unrelated to State Farm's subrogation claim, are not sufficient grounds for disqualification. (See *In re Marriage of Lemen* (1980) 113 CalApp.3d 769, 788-790.)

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1 White contends Judge Rosado had a relationship with the owner of a massage parlor and as a consequence made a ruling favorable to a vice squad officer who was familiar with the relationship.

B. *Substantial Evidence*

Throughout White's brief there is a suggestion that he judgement is not supported by sufficient evidence of Carey's damages. In making this claim, White face familiar and formidable hurdle. "[U]nder the substantial evidence test, the court views the evidence in a light most favorable to the respondent. In other words, factual matters will be viewed most favorably to the prevailing party. [Citation.] '*Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court.* The presumption being in favor of the judgment . . . the court must consider the evidence in the light *most favorable to the prevailing party,* giving him the benefit of *every reasonable inference,* and *resolving conflicts* in support of the judgment.' [Citation.] An appellate court's ' . . . power begins and ends with a determination as to whether there is *any* substantial' evidence to support [the factual findings]; [it has] no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or *in the reasonable inferences that may be drawn therefrom."* [Citation.]'" *(Orange County Employees Assn. v. County of Orange (1988)* 205 Cal.App.3d 1289, 1293.)

Here, Carey testified extensively as to the damages she suffered and was cross-examined by White as to each item of damage she claimed. In light of Carey's testimony as to the extensive damage her home suffered and the cost of repairs and replacement, the jury-could reasonably conclude that she suffered $43,000 in damages as a result of the flood. Thus, White's arguments notwithstanding, there is more than sufficient evidence to support the judgment.

C. Continuance and Cross-Complaint

We find no abuse of discretion in the trial court's denial of White's motion for leave to file a cross-complaint and its refusal to grant him a second continuance. With respect to the

proposed cross-complaint against the water district, we note that at the time White moved for leave to file it, a trial date had already been set. Given this procedural posture and the potential delay bringing a third party into the proceedings, the trial court acted well within its discretion in denying leave. (See *Crocker Nat. Bank v. Emerald* 221 Cal.App.3d 852, 864.) (1990) 221 Cal.App.3d 852, 864.)

With-respect to White's motion for leave to file a cross-complaint against State Farm, we note that the only operative allegations in the proposed cross-complaint are that State Farm did not have a viable subrogation claim against White and litigated against White in an unfair manner. White's attack on the viability of State Farm's claim is indistinguishable from a claim for malicious prosecution and may not be brought by way of a cross-complaint. *(Babb v. Superior Court* (1971) 3 Cal.3d 841, 846.) Moreover, White's allegations with respect to State Farm's conduct of the litigation are barred by Civil Code section 47, subdivision (b)(2). *(Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1333; *Doctors' Co. v. Superior Cou.* (1990) 225 Cal.App.3d 1284, 1299.)

There is no right to a continuance and whereas here, one continuance has already been granted, there is no abuse of discretion in denying a second request for a continuance made c the eve of trial. (See *Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 171-172.)

D. Limitation on Cross-Examination

White' complains the trial court unfairly limited his cross-examination of plaintiffs witnesses and his argument. As State Farm-notes, every court has the inherent power to regulate the proceedings of matters before it and to effect an orderly disposition of the issues presented. *(Baugess v. Paine*

(1978) Cal.3d 626, 635; Code Civ. Proc., § 128.) In particular, trial court's are required to "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment. n (Evid. Code, § 765.) Our review of the record discloses that the trial court granted White a great deal of leeway in his examination of plaintiff's witnesses and in his argument. In particular, witness trial court let White cross-examine Carey at considerable length and only cut off the examination after approximately an hour and a half. Thus we find no abuse of discretion in the limitations the trial court imposed on White's presentation of his defense.

E . Competence of Counsel

On appeal White also contends that prior-to his substitution, his counsel erred in failing to pursue his cross-complaint. White cites no authority and we are aware of none which would permit him to obtain reversal of a civil judgment based on his counsel's incompetence, when, as here that incompetence did not prevent White from fully contesting his liability.

F. Post-Judgment Proceedings

While this case was pending, White moved for an order permitting him to engage in additional discovery. (Code Civ. Proc., §.2036.) The trial court denied the motion. White also brought a motion in this court and it was denied.

Although it is not clear from the record, apparently White sought additional discovery to pursue his conspiracy theory. Because these claims are based largely on speculation separated by years from the events giving rise to State

Farms's subrogation claim, we find no abuse of discretion in the trial court's order denying additional discovery on these issues. For similar reasons we see no need to revisit this court's disposition or White's motion here.

G. Sanctions

State Farm has asked' for $600 in sanctions under rule 26 (a) of the California Rules of Court. State Farm asserts that White's accusations of judicial misconduct are frivolous and unrelated to the merits of the judgment. While we agree that many of White's arguments are frivolous and indeed incomprehensible, he has raised arguments with respect to the sufficiency of the evidence and the conduct of the trial court proceedings which, while unsuccessful, were not completely without merit. *(In re Marriage of Flaherty (1982)* 31 Cal.3d 637, 649 ["an appeal is not frivolous if 'any of the legal points [are] arguable on their merits']."") Accordingly, the request for sanctions is denied.

Judgment affirmed. Respondent to recover its costs of appeal.

S/BENKE, Acting P.J.

WE CONCUR:

S/NARES, J.
S/McDONALD, J.

Included in the classification of irregularities within the purview of Code Civ Proc, Sec. 657, subd 1, is an overt act of the judge which prevents the complaining party from having a fair and impartial trial, and it is immaterial whether or not the irregularity resulted from bias or prejudice. Develop-Amatic Engineering v. Republic Mortg. Co. (1970) [2 CA3d 143, 91 Cal Rptr 193]

A prosecutor who, while acting within the scope of his duties in initiating and prosecuting a case, willfully deprives the accused of his constitutional rights is subject to criminal punishment under 18 USCS, sec 242, which makes it a crime for a person, acting under color of law, to deprive another of any right protected by the Constitution or laws of the United States, and is subject to professional discipline or disbarment. Imbler v. Pachtman, 424 US 409, 96 S Ct 984, 47 L Ed 2d 128

Supreme Court Rule 10.
Considerations governing Review on Certiorari

(A) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(B) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

FRE. 804 a4 Heresay Exceptions; Declarant Unavailable

(a) Definition of Unavailability.

"Unavailability as a witness" includes situations in which the declarant -

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.